No. 148

# In the Supreme Court of the United States

OCTOBER TERM, 1944

WEBB STEIB COMPANY, LTD., PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

# INDEX



## CITATIONS





597861—44——1

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The findings of fact and memorandum opinion of the Processing Tax Board of Review (R. 30–42) are unreported. The opinion of the Circuit Court of Appeals (R. 73–77) is reported at 140 F. 2d 768.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 15, 1944 (R. 78). Petition for rehearing was denied March 13, 1944 (R. 84). Petition for a writ of certiorari was filed June 12, 1944. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the court below erred in holding that, under Section 902 of the Revenue Act of 1936, the taxpayer failed to establish that it bore the ultimate burden of any part of the processing taxes which it paid and which it sought to recover.

2. Whether it was error not to permit the substitution of a calculation of the taxpayer's "margin" upon the processed commodity during the 1936 crop months for a calculation covering the post-tax period prescribed in the Act.

## STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 15–20.

## STATEMENT

This proceeding was instituted in the Processing Tax Board of Review[1] upon the disallowance by the Commissioner of Internal Revenue of the taxpayer's claim, filed under Title VII of the Revenue Act of 1936, for the refund of processing taxes in the amount of $8,169.97, paid under provisions of the Agricultural Adjustment Act, as amended,

[1] The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, as of the close of business on December 31, 1942, and its jurisdiction and functions were transferred to the Tax Court of the United States.

which were declared unconstitutional in *United States* v. *Butler*, 297 U. S. 1.

Section 902 of the Revenue Act provides that the taxpayer may not recover any sum unless he establishes that he has borne the ultimate economic burden of the tax to the extent of the amount awarded and has not shifted it by charging higher prices or by paying lower prices for unprocessed material or in any other manner. As a means of determining the incidence of processing taxes sought to be recovered, the Act further provides in Section 907 (Appendix, *infra*, pp. 16–20) that the extent of the reduction, if any, in the average margin of receipts over cost of raw materials plus processing taxes, enjoyed by the processor per unit of the commodity processed during the period the taxes were paid, as compared with the average margin of receipts over raw material costs during the 24 months preceding and the 6 months immediately following the period the statute was in effect, shall be "prima-facie evidence" of the extent to which the processor bore the burden of the tax; but "either the claimant or the Commissioner may rebut the presumption" so established "by proof of the actual extent to which the claimant shifted" the burden to others, including, "but * * * not * * * limited to— * * * proof that the difference or lack of difference" between the margin averages was due to other factors and "proof" that the processor modified its contracts of sale "or adopted a new form of con-

tract of sale, to reflect the initiation * * * of the processing tax, or ** * * changed the sale price of the article * * * by substantially the amount of the tax * * *, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax * * *; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times." Section 907 (e), Appendix, *infra*, pp. 19–20.

According to the findings of the Processing Tax Board of Review (R. 31–36), the taxpayer during the entire period here under consideration was engaged in the operation of a plantation, upon which it grew sugarcane; in purchasing sugarcane from others; and in processing cane into direct-consumption sugar and edible molasses. It was a processor of sugarcane within the meaning of the Agricultural Adjustment Act, as amended (R. 31).

The tax period in question began June 8, 1934, and ended November 8, 1935. During the harvest months of October, November and December, 1934, and October and November, 1935, the taxpayer engaged in processing, filed processing tax returns, and paid processing taxes aggregating $8,168.74, plus interest of $1.23.[1] (R. 34.)

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[1] The tax and interest on sugar were $7,067.12 and on molasses $1,102.85 (R. 32).

Universal increases in the sale price of sugar took place on the effective date of the processing tax, June 8, 1934, in approximately the amount of the tax (R. 34). All of the accounts stated between the taxpayer and its broker, E. A. Rainold, Inc., respecting sales of molasses, included the processing tax as a separate item in addition to the sale price of the article (R. 35). A letter to the taxpayer from its broker early in 1936 stated that taxpayer did not pay any more tax upon 320,000 pounds of its sugar than was collected from its purchasers (R. 36).

All sales of sugar by the taxpayer were made through brokers in the open market, in competition with other manufacturers. Because of its inferior quality, taxpayer's sugar sold at a price which averaged 80 cents a hundred pounds less than the price of standard refined sugar. (R. 32.)

In December, 1934, the taxpayer, as a producer of sugarcane, entered into a sugarcane production adjustment contract under the Agricultural Adjustment Act, as amended, pursuant to which it received benefit payments from the United States; but neither it nor any grower from whom it purchased sugarcane received additional payments which were authorized in case returns were reduced by reason of lower prices paid by processors on account of the processing tax (R. 32–33, 41).

Upon the ground that it processed no sugar during the six months immediately following the decision which invalidated the tax (R. 34), the taxpayer sought to substitute a calculation of its average margin of profit during the fall of 1936, when it next engaged in processing a crop, for a calculation of its margin during the six months prescribed by the statute (R. 34). Both the Board (R. 39) and the court (R. 75–76) held that the statute did not authorize the use of such a calculation.

The Board found that the taxpayer's average margin for the tax period, computed as directed in the statute, was $.01192 per pound of raw sugar processed. During the prescribed "base period" before and after, it was $.01354. Hence the average margin was $.00162 lower during the tax period than it was during the base period. (R. 35.) Concluding that the taxpayer had borne the burden of the tax to the extent indicated by this reduction in margin, the Board awarded a refund of $3,655.82, arriving at this result by multiplying the difference in margins by the number of units processed (R. 35–36).

The Circuit Court of Appeals concluded (R. 77) that the findings with respect to other facts fully rebutted the presumption arising from the difference between average margins and that, since there was no other basis for the refund, the decision of the Board must be reversed.

ARGUMENT

The instant case presents no basis for the issuance of a writ of certiorari. Each case of this kind turns necessarily upon its own facts. The decision of the court below is correct on the basis of the findings of the Board, without reference to the doctrinal difference between the opinion below and the utterances of other courts, to which petitioner points. The questions presented, even if the Circuit Court of Appeals erred in some respect, lack the significance which would warrant their consideration upon the merits by this Court.

I

The presumption here involved, based upon the "prima facie" evidence of difference between average margins, was established by Congress; and in the same legislation Congress specified how the presumption might be overcome. Whether the prima facie evidence created a "mere" presumption in the sense of *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, which causes the evidence upon which it is based to lose all weight the moment counter-evidence is introduced, or whether the basis for the presumption continues to have weight as evidence after the presumption has been dissolved, it is clear under the statute that certain countervailing evidence serves fully to rebut the presumption, including the evidence upon which the presumption rests. The Board made findings

based upon counter-evidence of the specified sort, which was present in the case, and there was no other evidence in support of the taxpayer's position. Therefore the court below properly reversed the decision of the Board as a matter of law.

The basis for the holding of the court below that the presumption was rebutted appears from its statement (R. 77; emphasis supplied) that "*this* evidence [of petitioner's policy of collecting the tax from its customers] clearly was sufficient to dissolve the presumption." No statement was made in the opinion that any countervailing evidence, of whatever sort, would have been sufficient; on the contrary, the question was stated to be (R. 76) "whether * * * the facts adduced upon the hearing and found true by the Board rebutted the presumption upon which the refund depended." The court was proceeding in accordance with the view previously stated by this Court with regard to the presumption in question: "The stated presumptions are rebuttable. If they work adversely to * * * [a taxpayer's] interests, * * * [he] will have ample opportunity to prove *all the rebutting facts*." *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 355 (italics supplied). In the *Anniston Mfg. Co.* case this Court fully sustained the processing tax provisions of the Revenue Act of 1936 upon the ground that they did not operate unfairly to the taxpayer in any respect. This is true whatever the precise nature of the

statutory presumption, in view of its rebuttable character.

It is true that the court below adhered to its ruling in *Commissioner v. Bain Peanut Co.*, 134 F. 2d 853, 860, certiorari dismissed March 6, 1944, that the presumption "is of the nature of that dealt with" in the *Turnipseed* case, and that the Circuit Court of Appeals for the Second Circuit expressed a contrary view in *E. Regensburg & Sons v. Helvering*, 130 F. 2d 507. Actually, however, the decisions of the two courts are in harmony, since in both cases the presumption was deemed to be subject to rebuttal by means of specific evidence. In both cases the decision of the Processing Tax Board of Review was reversed because the evidence of comparative margins was given improper effect by the Board in the face of countervailing evidence.

In the *Regensburg* case the presumption arising from the difference in margins was that the taxpayer had not borne the burden of any of the tax; but there was evidence, which the Processing Tax Board of Appeals refused to consider, that the increased margin during the tax period was caused by reduced costs having no connection with the tax, and not by any increase in selling price or reduction in the purchase price of raw materials on account of the tax. The Circuit Court of Appeals held that this evidence, if findings were based upon it, might fully rebut the presump-

tion. Accordingly it remanded the case to the Board for proper findings and further action.

In the instant case the Board made findings with respect to the facts upon which the Commissioner relied, but erroneously concluded that the taxpayer was still entitled to recover the portion of the tax indicated by the presumption. The court below had no occasion to look to the evidence itself. The findings established some of the very factors which are enumerated in the statute—namely, an increase in price to the extent of the tax at the time it went into effect and separate billing of the tax—as well as a statement by its broker that the tax had been paid by purchasers, as means of rebutting the presumption. Clearly the court exercised a proper function upon judicial review by drawing the proper legal conclusion from the facts found. *Epstein* v. *Helvering*, 120 F. 2d 427 (C. C. A. 4th). If the court erred in any respect, moreover, the question which is raised is not one which would warrant this Court in exercising its supervisory powers by means of a writ of certiorari.

*Helvering* v. *Insular Sugar Refining Corp.*, 141 F. 2d 713 (App. D. C.), also cited by the petitioner (Pet. 8), also turns upon its own facts. There, as here, the presumption arising from the margin evidence was favorable to the taxpayer with respect to a portion of the processing taxes paid, and the Board made an award which was

determined accordingly. The Board, however, did not make findings comparable to those in the instant case. On the contrary, it found with respect to sales made through brokers in the United States, which constituted 85 percent of the total, that the taxpayer did not include the processing tax in its invoices and that in only a few instances was the price shown to have included the tax. The Board considered that there was other evidence which supported the conclusion to which the margin evidence pointed. The majority of the reviewing court, with Judge Edgerton dissenting, sustained the Board on the basis of the findings made. The Government has not petitioned for certiorari because it does not deem the questions involved to call for review by this Court.

II

The Board and the court below were correct in holding that it would have conflicted with the statute to permit the petitioner to substitute a different post-tax period for the immediate six-month period prescribed in the statute, as a period during which the taxpayer's margin should be calculated for comparison with the average margin during the period the tax was paid. Section 907 (c) (Appendix, *infra*, pp. 18–19) specifies that the period after the tax shall be "the six months, February to July, 1936, inclusive." No exception is contemplated or permitted with respect to the

period to be employed. Specific provision is made, "if during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data * * *," whereby "the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations." This provision of the statute states the sole means whereby different evidence may be substituted in calculating the statutory margins for that which is employed in the normal case; and it authorizes no substitution of dates.

Neither the case of *Epstein* v. *Helvering*, 120 F. 2d 427, nor that of *Arkwright Mills* v. *Commissioner*, 127 F. 2d 465, both decided by the Circuit Court of Appeals for the Fourth Circuit, which are cited by the petitioner (Pet. 8–9), lends support to petitioner's theory. In the *Epstein* case the court held that the Processing Tax Board of Review should not have excluded from consideration certain pertinent factors, operating within the statutory six-month post-tax period, which tended to negative the presumption established by the margin evidence, which in that case was that the taxpayer had shifted the entire burden of the tax. In the *Arkwright Mills* case the court held

that the Board should have taken into account data adduced by the taxpayer for the purpose of corroborating a theory that margins in the textile industry varied proportionately to prices instead of remaining constant, even though the data included statistics with reference to prices as much as 30 months after the tax period. The evidence thus held to be relevant would not have substituted a different calculation of margins for those prescribed by the statute, but was designed to aid in the interpretation of the margin evidence.

There is a great difference between, on the one hand, supplementing by other evidence the evidence with regard to margins which the statute prescribes and, on the other hand, attempting to substitute a margin calculation covering a different period from that which the statute sets forth. There is no authority for the latter course, which flies in the face of the statutory provision. The court below decided this point correctly. *Colonial Milling Co.* v. *Commissioner*, 132 F. 2d 505, 508 (C. C. A. 6th), certiorari denied, 318 U. S. 780. And again, if it should be thought that the court erred, the question presented is not such as to warrant consideration by this Court upon certiorari.

## CONCLUSION

There is no conflict of authorities. The decision below is correct. We respectfully submit

that the petition for a writ of certiorari should be denied.

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JULY 1944.

# APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

* * * * *

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed

therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C., Sec. 644.)

* * * * *

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid

with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average Margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of Commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of Commodity.*—The cost of commodity processed during each month

shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross Sales Value of Articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of

such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that

the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. * * * (7 U. S. C., Sec. 649.)

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